

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

**BARBARA MEIER, MADISON HOUGH,
JASON HOUGH, GOVINDA HOUGH,
TIFFANY YOUNG, SANDRA STOKES,
YOLANDA McPHERSON, TROY HARVEY,
BILL CROWELL, DIANE CREEL,
LYNN CREEL, and JALISA GREEN,**

Plaintiffs,

v.

**UHS OF DELAWARE, INC.;
UNIVERSAL HEALTH SERVICES, INC.;
MAYHILL BEHAVIORAL HEALTH, LLC;
SABAHAT FAHEEM;
KENNETH CHAD ELLIS;
MILLWOOD HOSPITAL, LP;
SEJAL MEHTA; GARY MALONE;
BEHAVIORAL HEALTH MANAGEMENT,
LLC d/b/a BEHAVIORAL HOSPITAL OF
BELLAIRE; JAMAL RAFIQUE;
HICKORY TRAIL HOSPITAL, LP;
UNIVERSAL PHYSICIANS, P.A.;
DR. SAYS LLC; MD RELIANCE, INC.;
OFFICEWINSOME, LLC; YU-PO JESSE
CHANG; QUINGGUO TAO; TIMOTHY TOM;
HARMANPREET BUTTAR; YUNG HUSAN
YAO; BEHAVIORAL HEALTH
CONNECTIONS, INC.; WENDELL QUINN;
and JAN ARNETT,**

Defendants.

Civil Action No.: 4:18-cv-00615-alm

**DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION TO STRIKE PLAINTIFFS'
PHYSICIAN EXPERT, MARK BLOTCKY, M.D.**

COME NOW, Defendants Universal Health Services, Inc., UHS of Delaware, Inc., Behavioral Health Connections, Inc., Jan Arnett, and Wendell Quinn (collectively, the “UHS Defendants”); Defendants Mayhill Behavioral Health, LLC, Millwood Hospital LP, Hickory Trail Hospital, LP, and Behavioral Health Management, LLC d/b/a Behavioral Hospital of Bellaire (collectively, the “Hospital Defendants”); Defendants Universal Physicians, P.A., Dr. Says, LLC, MD Reliance, Inc., Officewinsome, LLC, and Yu-po Jesse Chang (collectively, the “Chang Defendants”); Defendant Qingguo Tao; Defendant Harmanpreet Buttar; Defendant Yung Husan Yao; Defendant Jamal Rafique; Defendant Sejal Mehta; Defendant Gary Malone; and Defendant Timothy Tom (all collectively, “Defendants”), by and through undersigned counsel, file this Reply in Support of their Motion to Strike the Testimony and Report of Plaintiffs’ Expert Physician Mark Blotcky, M.D.

ARGUMENTS AND AUTHORITIES

Initial expert disclosures under Fed. R. Civ. P. 26(a)(2)(B) are expected to be “full and complete.” *In re Complaint of C.F. Bean L.L.C.*, 841 F.3d 365, 371 (5th Cir. 2016). The Rule “**does not allow parties to cure deficient expert reports by supplementing them with later deposition testimony,**” *Robinson v. Nationwide Mut. Fire Ins. Co.*, No. 4:11-CV-103-M-V, 2012 WL 5866302, at *1 (N.D. Miss. Nov. 19, 2012) (emphasis added). Fed. R. Evid. 702 provides that a witness qualified as an expert may testify in the form of an opinion if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004).

1. Plaintiffs’ Disclosures Are Not in Compliance with Fed. R. Civ. P. 26(a)(2).

As discussed in Defendants’ Joint Motion to Strike Plaintiffs’ Physician Expert, Mark

Blotcky, MD (Dkt. No. 388), Blotcky's report is incomplete. As an example, he did not perform an interview of Plaintiffs Green and Young, and he provided no diagnosis or treatment recommendations for either of them. *See* Dkt. No. 375-2. Blotcky's report is conclusory, fails to take into account relevant evidence, and fails to establish a causal link between Defendants' conduct and Plaintiffs' complained-of injuries. The Fifth Circuit has recognized that it is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. *See Ellis v. United States*, 673 F.3d 367, 373 (5th Cir. 2012). The expert also must, to a reasonable degree of medical probability, explain *how* and *why* the negligence caused the injury. *Id.* Dr. Blotcky's one-sentence causation opinion (e.g., "These actions caused harm" to Plaintiffs) is merely a conclusory statement devoid of any link to any Defendant, and cannot be used as probative evidence. *See id*; *see also* Dkt. No. 375-2 at 25 (Green: "The result of this for her has been being a little mistrustful of people"). His speculation on causation, while possibly better informed than a layman, more closely resembles the latter.

As discussed in Dkt. No. 388 and incorporated herein, balancing of the *Geiserman* factors weighs in favor of excluding Dr. Blotcky's report and testimony. Plaintiffs' failure to comply with Rule 26(a)(2) was neither substantially justified nor harmless and, as a result, the Court should strike Blotcky's testimony and report.

2. Plaintiffs' Disclosures Also Fail to Comply with Fed. R. Evid. 702 and *Daubert*.

A party offering an expert's testimony has the burden to prove by a preponderance of the evidence their expert is qualified, his testimony is relevant, and his testimony is reliable. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590-91 (1993). First, Dr. Blotcky's opinions are not reliable as they are not based on sufficient facts or data. Dr. Blotcky bases his "forensic psychiatric evaluation" on Plaintiffs' TAC and admission records; he did not rely on any collateral sources in

formulating his “diagnoses,” nor in his plan of treatment for each Plaintiff.¹ Dr. Blotcky failed to request and review any Plaintiffs’ medical or psychological records from a third-party source,² despite mentioning in his report that many Plaintiffs have a history of psychiatric illness predating their admissions to Defendant Hospitals and alluding to several Plaintiffs undergoing therapy after being discharged. *See* Dkt. No. 375-2. Dr. Blotcky relied on those acknowledgments by Plaintiffs as dispositive of Defendants’ mistreatment; indeed, he relied on Plaintiffs’ subsequent treatment as evidence of causation. *See id.*

Even if Dr. Blotcky’s report and testimony are deemed relevant, his report still does not pass the *Daubert* test because, as discussed, it lacks reliability. Blotcky inappropriately links Plaintiffs’ mental health diagnoses with previous inpatient admissions based only on mental health evaluations performed years after those admissions, and without reviewing relevant data including past or recent medical and psychological records for those patients. *See, e.g.,* Dkt. No. 375-2 at 17 (based on an evaluation performed on November 19, 2019, concluding that Plaintiff Diane Creel has “PTSD secondary to her treatment in the inpatient facility” in August 2017 and that “[t]he stay at BHB was a substantial factor in causing her damage to her ability to work in her husband’s business and this would not have occurred without her stay at BHB”).

Dr. Blotcky is unqualified to opine about most of the issues in this case, and exceeds the scope

1

In her deposition, Sandra Stokes stated she had numerous medical records in her possession, which she provided to her lawyers over one year ago. Plaintiffs’ counsel subsequently admitted to having these records, but had not produced them to Defendants with initial disclosures. One imagines this was the same for other Plaintiffs. Thus, medical records from collateral sources were available for Dr. Blotcky’s review, but were not provided to him such that he could rely upon them in forming his opinions.

2

“Sources of information like old clinical records, if available or family members or other informants, need to be mentioned [in the expert report].” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3890920/>

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of his knowledge, training, education, and experience by inappropriately providing causation opinions on issues such as the need for a “financial evaluation study” (Dkt. No. 375-2 at 51), “forgery of documents and fabrication of records” (*id.* at 53), compensation paid by a treatment facility to its employees and agents (*id.* at 56), an entity’s allegedly improper qualification as a mental health referral service (*id.*), improper representations allegedly made by Defendant Universal Health Services (*id.*), and alleged solicitation of referrals (*id.* at 56-57), and certain actions violated provisions of the Texas Health & Safety Code (*id.* at 53-57, opinions 21, 23, 29, 31, 32, 35-41, 43-45). It would be improper to “invite the jury to rely on expert opinion consisting of conclusions based partly on generally inadmissible [] evidence.” *Sandifer v. Hoyt Archery, Inc.*, 907 F. 3d 802, 809 (5th Cir. 2018) (citation omitted).

CONCLUSION AND PRAYER

Defendants respectfully request that this Court grant this Motion in its entirety and, for the reasons discussed herein, strike Dr. Mark Blotcky’s testimony and report. Defendants also request that this Court grant all other and further relief to which they may be justly entitled.

Dated: December 27, 2019

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

In compliance with the meet and confer requirement in Local Rule CV-7(h), I hereby certify that counsel for the Hospital Defendants, on behalf of all Defendants, conferred with Plaintiffs' counsel, John Burkhead, regarding the relief requested by Defendants in the foregoing motion. The parties were unable to reach an agreement. As such, Mr. Burkhead stated that Plaintiffs are opposed to the relief requested by Defendants' foregoing motion.

/s/ Russ W. Schell
Russell W. Schell

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on Plaintiffs' counsel of record via the ECF System on this 27th day of December, 2019.

/s/ Russ W. Schell
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